21-15751

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHICKEN RANCH RANCHERIA OF ME-WUK INDIANS; CHEMEHUEVI INDIAN TRIBE; BLUE LAKE RANCHERIA; HOPLAND BAND OF POMO INDIANS; ROBINSON RANCHERIA,

Plaintiffs-Appellees,

v.

STATE OF CALIFORNIA; GAVIN NEWSOM, Governor of California,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of California

No. 1:19-cv-00024-AWI-SKO
The Honorable Anthony W. Ishii, Judge

STATE APPELLANTS' OPPOSITION TO APPELLEES' MOTION FOR ATTORNEYS' FEES

ROB BONTA
Attorney General of California
SARA J. DRAKE
Senior Assistant Attorney General
T. MICHELLE LAIRD
Supervising Deputy Attorney General

TIMOTHY M. MUSCAT
Deputy Attorney General
State Bar No. 148944
NOEL A. FISCHER
Deputy Attorney General
State Bar No. 232553
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-7779
Fax: (916) 323-2319
Email: Timothy.Muscat@doj.ca.gov
Attorneys for State Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

INTRODUCTION

Defendants-Appellants, the State of California and Gavin Newsom, Governor of California (State Appellants or State) oppose Appellees' Motion for Attorneys' Fees (Tribes' Motion) filed by Plaintiffs-Appellees Chicken Ranch Rancheria of Me-Wuk Indians, Chemehuevi Indian Tribe, Hopland Band of Pomo Indians, Robinson Rancheria, and Blue Lake Rancheria (Tribes).

In this litigation, the Tribes prevailed against the State under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, 18 U.S.C. §§ 1166-1167 (IGRA). The Tribes do not contend that IGRA or any other provision of federal law authorizes a party prevailing in an IGRA suit to obtain an award of attorneys' fees. Instead, they claim that they are entitled to fees under a state fee-shifting statute, California Code of Civil Procedure section 1021.5. But it is well established that in a federal question case in federal court, like this one, federal law governs whether a party is entitled to fees. And there is no dispute that IGRA does not authorize any such award. The State is also immune from any award of fees. As the Tribes note, California Government Code section 98005 authorizes suits against the State for claims under IGRA, but the California Supreme Court has held that such authorization extends only to the remedies available under IGRA. Those remedies do not

include attorneys' fees. And if there were any ambiguity in the scope of the State's waiver of immunity, that ambiguity must be resolved in favor of immunity.

Finally, based on the limited record before this Court, the Tribes have not met all the statutory criteria for an attorneys' fees award under California Code of Civil Procedure Section 1021.5 (Section 1021.5). If this Court does not deny the Tribes' Motion based upon either the lack of authority for attorneys' fees or immunity from attorneys' fees, the question of the Tribes' eligibility for attorneys' fees under Section 1021.5 should be remanded to the district court for adjudication. For all of these reasons, State Appellants request this Court to deny the Tribes' Motion.

BACKGROUND ON REMEDIES UNDER IGRA

To address concerns about unregulated gambling on Indian lands, Congress passed IGRA in 1988 as a "compromise solution to the difficult questions involving Indian gaming." *Artichoke Joe's v. Norton,* 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002), *aff'd*, 353 F.3d 712 (9th Cir. 2003). IGRA provides "a statutory basis for the operation of gaming by Indian tribes" and is an example of "'cooperative federalism' in that it seeks to balance the competing sovereign interests of the federal government, state

governments, and Indian tribes, by giving each a role in the regulatory scheme." *Id.*

If a court determines that a state failed in its statutory obligation to negotiate in good faith, IGRA provides a detailed remedy for the tribes under 25 U.S.C. § 2710(d)(7)(B)(iv)-(vii). This congressionally approved remedial process may result in a proposed class III gaming compact selected by a mediator and offered to the state for its consent, or secretarial procedures under which class III gaming can be conducted by the tribe. *Id.* But under IGRA's cooperative federalism model, Congress's IGRA remedial process does not include any form of monetary or compensatory damages. *Id.* "[W]here the court finds that the State has failed to negotiate in good faith, *the only remedy prescribed* is an order directing the State and the Indian tribe to conclude a compact within 60 days." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 (1996) (*Seminole Tribe*) (emphasis added). These remedies do not include attorneys' fees, nor any other compensatory relief. *See* 25 U.S.C. § 2710(d)(7).

In this case, on March 31, 2021, the district court ruled that the State failed to negotiate in good faith under IGRA, and ordered the parties to proceed with IGRA's remedial process set forth in 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii). *Chicken Ranch Rancheria of Me-Wuk Indians v.*

California, 530 F. Supp. 3d 970, 988 (E.D. Cal. 2021) (*Chicken Ranch I*). On July 28, 2022, this Court affirmed, and directed "the parties to proceed to IGRA's remedial framework under the district court's continued supervision." *Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th 1024, 1049 (9th Cir. 2022) (*Chicken Ranch II*). Consistent with *Seminole Tribe* and IGRA, neither court awarded the Tribes attorneys' fees.

ARGUMENT

I. THE TRIBES ARE NOT ENTITLED TO ATTORNEYS' FEES UNDER CALIFORNIA'S FEE SHIFTING STATUTE

A. Attorneys' Fees are not Available to the Tribes Under IGRA

The Tribes' Motion should be denied because attorneys' fees are not authorized under IGRA. As this Court has clearly held, in "a pure federal question case in federal court, federal law governs attorneys' fees." *Disability Law Ctr. of Alaska, Inc. v. Anchorage Sch. Dist.*, 581 F.3d 936, 940 (9th Cir. 2009), (citing *Bass v. First Pac. Networks, Inc.*, 219 F.3d 1052, 1055 (9th Cir. 2000)); *see also Indep. Living Ctr. of S. Cal. Inc. v. Kent*, 909 F.3d 272, 281 (9th Cir. 2018) (*Kent*). The general rule in this country, the American Rule, is that each party must pay its own attorneys' fees. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257 (1975) (holding that attorneys' fees are not ordinarily recoverable). "(A)bsent

statute or enforceable contract, litigants pay their own attorneys' fees." *Id*., (citing *F. D. Rich Co*., *Inc. v. U. S. for Use of Indus. Lumber Co., Inc.*, 417 U.S. 116, 128-31 (1974)).

This action was brought in federal court alleging that the State violated IGRA. *Chicken Ranch I*, 530 F. Supp. 3d at 974. But IGRA does not contain a statutory provision for recovery of attorneys' fees. *See* 25 U.S.C. § 2710(d)(7). IGRA's complete silence on attorneys' fees stands in sharp contrast to numerous federal statutes that explicitly permit an award of attorneys' fees, further demonstrating Congress's intent not to provide for such awards under IGRA. *See Hotel Emps. & Rest. Emps. Int'l Union v. Davis*, 21 Cal. 4th 585, 615 (1999) (*Hotel Employees*) (citing the federal Tort Claims Act at 28 U.S.C. §§ 2671-2680, which provides for awards of attorneys' fees in § 2678); 33 § U.S.C. 1365(d) (authorizing recovery of litigation expenses and attorneys' fees under the Federal Water Pollution Control Act); 42 U.S.C. § 7604(d) (authorizing recovery of litigation costs and attorneys' fees under the Clean Air Act).

B. Attorneys' Fees are not Available to the Tribes Under State Law Because this Case Neither Alleged Nor Adjudicated any State Law Cause of Action

The Tribes do not assert that IGRA authorizes attorneys' fees' awards but instead claim that they are entitled to seek these fees under California Code of Civil Procedure Section 1021.5 (Section 1021.5). This argument is without merit. In analyzing such state-law attorneys' fees claims in federal court, this Court has held that the key question is "whether Appellants brought a state-law claim or a federal claim, for the answer to that question will determine whether they are entitled to seek attorneys' fees pursuant to California's § 1021.5 in federal court." *See Kent*, 909 F.3d at 278.

Kent was filed initially in California state court based on a writ claim under California Code of Civil Procedure Section 1085 (Section 1085). The state case was removed to federal court to resolve a claimed preemption argument under the United States Constitution's Supremacy Clause. *Kent*, 909 F.3d at 278. Ultimately, *Kent* held that the appellants' Section 1085 writ "endured as a state law claim." *Id.* at 280. This provided the appellants in *Kent* with a state-law basis to request attorneys' fees under Section 1021.5. *Id.* at 281.

Additionally, in *City of San Jose v. San Jose Police Officer's Association*, the district court held "state law with respect to attorneys' fees

applies in federal court only where state substantive law governs the underlying action." *City of San Jose v. San Jose Police Officer's Ass'n*, 2013 WL 4806453, at *2 (N.D. Cal. 2013) (*City of San Jose*), (citing *Champion Produce, Inc., v. Ruby Robinson Co.*, 342 F.3d 1016, 1024 (9th Cir. 2003)). "That is, a federal court usually applies state attorneys' fees statutes only where the federal court is sitting in diversity jurisdiction or is exercising supplemental jurisdiction over state law claims." *Id.,* (citing *Cotton v. Slone*, 4 F.3d 176, 180-81 (2d Cir. 1993)). "In such circumstances, the federal court applies the substantive law of the state to the claim and awards attorneys' fees pursuant to state law." *Id.*

In clear contrast to *Kent*, and in line with *City of San Jose*, this case is based on federal law, and not state law. Specifically, the Tribes exclusively litigated and prevailed under IGRA, a federal statute. The Tribes' Second Amended Complaint alleged claims only under IGRA, and they concede that their "complaint does not expressly allege a state law cause of action." (Tribes' Mot. 18.) As a result, neither the district court nor this Court considered any state-law causes of action, much less violations of any state laws. *See Chicken Ranch II*, 42 F.4th at 1031-49. Accordingly, there is no support in the record for the Tribes' argument that this IGRA litigation "was based on the application and interpretation of state law as well as federal

law" (Tribes' Mot. 16) and that "violations of federal law in this case are inextricably intertwined with violations of state law . . . ." (Tribes' Mot. 1.) The Tribes' attempt to expand *Kent* to permit state law attorneys' fees awards in federal court cases that do not adjudicate a state law claim remains wholly without support.

In sum, the sole cause of action litigated in this case was a federal claim under IGRA. No state law causes of action were pled or adjudicated. For this reason alone, the Court should deny the Tribes' Motion.

II. ELEVENTH AMENDMENT IMMUNITY BARS THE TRIBES' CLAIM FOR ATTORNEYS' FEES

The Tribes' request for fees under Section 1021.5 fails for the additional reason that the State is immune from claims for attorneys' fees. The Eleventh Amendment provides states with sovereign immunity from suit in state and federal court brought by private parties and certain sovereignties. *Seminole Tribe*, 517 U.S. at 58; *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779-82 (1991) (*Blatchford*).

Here, the State is immune from the Tribes' attorneys' fees claim because it has not waived its sovereign immunity. California Government Code section 98005 provides only a limited immunity waiver for specific types of claims arising under IGRA, which are enumerated in Section 98005

and do not include attorneys' fees. *See Hotel Employees,* 21 Cal. 4th at 614-15. The state-law sources cited by the Tribes in support of their claim, specifically article IV, section 19(f) of the California Constitution, California Government Code section 12012.25(d), and the Tribes' 1999 Compacts[1] similarly fail to provide a waiver because the texts do not unambiguously waive sovereign immunity to attorneys' fees. *See Sossamon v. Texas*, 563 U.S. 277, 285-88 (2011) (*Sossamon*). If anything, these provisions all point to IGRA, which itself is not a basis for waiver of a state's sovereign immunity and instead enumerates a detailed remedial scheme that controls here. *See* 25 U.S.C. § 2710(d)(7); *Seminole Tribe*, 517 U.S. at 73-75.

A. The State Is Immune to Claims for Attorneys' Fees Under the Eleventh Amendment Unless Unambiguously Waived

The Eleventh Amendment affords states sovereign immunity in both state and federal courts to prevent "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Seminole Tribe*, 517 U.S. at 58 (citations omitted). Sovereign immunity extends to suits against a state by sovereign Native American tribes.

[1] The California Gambling Control Commission (CGCC) displays all the class III gaming compacts in California, including the 1999 Compacts for these Tribes. http://cgcc.ca.gov/documents/tribal/2020/List_of Casinos_alph_by_casino_name.pdf.

Blatchford, 501 U.S. at 779-82. Early Eleventh Amendment jurisprudence recognized sovereign immunity bars suits "seeking to impose a liability [against states] which must be paid from public funds." *Edelman v. Jordan*, 415 U.S. 651, 665-71 (1974) (*Edelman*).

A state may be subject to suit based only on narrow exceptions to sovereign immunity, including waiver. *Sossamon*, 563 U.S. at 284. Waiver of immunity "must be unambiguous, regardless of the waiver of sovereign immunity from any other form of relief." *Bird v. Oregon Comm'n for the Blind*, 22 F.4th 809, 813 (9th Cir. 2022) (*Bird*) (citations omitted), *cert. denied*, 2022 WL 4652118 (Oct. 3, 2022). When waiver is ambiguous or a "statute is susceptible of multiple plausible interpretations," courts "will not consider a State to have waived its sovereign immunity." *Sossamon*, 563 U.S. at 287 (citations omitted).

B. The State Has Not Waived Sovereign Immunity to Attorneys' Fees Here

While the Tribes note that the State has authorized suit against it for IGRA claims under California Government Code section 98005 (Section 98005), no applicable state or federal law cited by the Tribes provides explicit and specific waiver for attorneys' fees. Sovereign immunity therefore bars the Tribes' claims for attorneys' fees.

1. Section 98005 Does Not Provide an Unambiguous Waiver to Attorneys' Fees Claims

The Tribes acknowledge that "but for" California's waiver of sovereign immunity in Section 98005 to certain claims related to IGRA, the Tribes would be barred from filing suits alleging a failure to negotiate in good faith against the State. (Tribes' Mot. 1.) *See Chicken Ranch II*, 42 F.4th at 1032 n.1. The Tribes argue here that the State's waiver of sovereign immunity in Section 98005 extends to claims for attorneys' fees because the State allegedly violated both state and federal law. (Tribes' Mot. 13-14.)

The Tribes' interpretation of Section 98005 is mistaken. Far from unambiguously waiving immunity for claims for attorneys' fees, this statute provides for only a limited waiver to certain claims arising under IGRA. Cal. Gov't Code § 98005; *see Hotel Employees*, 21 Cal. 4th at 614-15. Similarly, the text of article IV, section 19(f) of the California Constitution, California Government Code section 12012.25(d), and the 1999 Compacts do not waive sovereign immunity here because each is silent as to attorneys' fee awards.

Section 98005 focuses on the "resolution of future disputes concerning the negotiation, amendment and performance" of class III gaming compacts under IGRA. *Hotel Employees*, 21 Cal. 4th at 614. The final, and only

enforceable, sentence in Section 98005 waives California's sovereign immunity to suits by tribes in federal court arising from the negotiation of and adherence to class III gaming compacts under IGRA. *Id.* Section 98005 states, in part:

> [T]he State of California also submits to the jurisdiction of the courts United States in any action brought against the state by any federally recognized California Indian tribe asserting any cause of action arising from the state's refusal to enter into negotiations with that tribe for the purpose of entering into a different Tribal-State compact pursuant to IGRA or to conduct those negotiations in good faith, the state's refusal to enter into negotiations concerning the amendment of a Tribal-State compact to which the state is a party, or to negotiate in good faith concerning that amendment, or the state's violation of the terms of any Tribal-State compact to which the state is or may become a party.

There is no waiver for attorneys' fees. Indeed, this language of Section 98005, in providing the State's consent to such a suit, is obviously intended "to restore to California tribes the remedy provided in IGRA." *Hotel Employees*, 21 Cal. 4th at 615. And, as previously discussed, IGRA provides no remedy for attorneys' fees.

This Court and the Supreme Court have discussed waivers of sovereign immunity as to claims for monetary damages against a state in *Bird*, 22 F.4th at 814-15, and *Sossamon*, 563 U.S. at 285-88, respectively. In *Bird*, the Ninth Circuit found that Oregon was not liable for monetary damages and

attorneys' fees where a state commission consented to a federal statute and operating agreements that were both silent on attorneys' fees. *Bird*, 22 F.4th at 815. The commission's consent to the statute requiring arbitration of disputes did not "unequivocally waive sovereign immunity from liability for money damages" even though arbitration is commonly understood to involve compensatory damages. *Id.* at 814-15.[2]

Similarly, in *Sossamon*, the Supreme Court held that a federal statute's authorization of "appropriate relief" was too ambiguous to constitute a state waiver of sovereign immunity to suits for damages. *Sossamon*, 563 U.S. at 285-88. Rather, the term "appropriate relief" was "[f]ar from clearly

[2] *Bird*'s decision to reject attorneys' fees against Oregon based on the federal statute, rather than under the Eleventh Amendment, is in line with other cases addressing awards of attorneys' fees under the same statute. For example, in *Ohio v. United States Department of Education*, 986 F.3d 618 (6th Cir. 2021) (*Ohio*), the Sixth Circuit upheld the district court's denial of attorneys' fees against the state because the same federal statute "does not provide for—or even mention—attorneys' fees." *Id.*, 986 F.3d at 631. Although the district court "rejected the attorneys' fees award on sovereign immunity grounds," the Sixth Circuit concluded that it "need not address whether sovereign immunity bars the fees" because traditional attorneys' fee rules require both parties pay their own costs absent a statute or contract instructing otherwise. *Id*. at 631-33. The *Bird* court also avoided the constitutional question as to attorneys' fees by relying on the statute. *Bird*, 22 F.4th at 815. As discussed above, IGRA is similar to the federal statutes in *Ohio* and *Bird* because none of them provide for attorneys' fees.

identifying money damages" or evidencing Congress's intent to provide compensatory relief. *Id.* at 286.

The State's consent in Section 98005 to good-faith litigation under IGRA does not waive the State's immunity to attorneys' fees claims because its language does not unambiguously express such a waiver. Like the commission's consent to the federal statute at issue in *Bird*, Section 98005's language submitting the State to federal court jurisdiction for federal claims alleging a failure to negotiate in good faith does not mention attorneys' fees at all. *Bird*, 22 F.4th at 815. Because Section 98005 is silent on attorneys' fees, the statute does not "unequivocally" waive the State's immunity to a claim for such fees. *Sossamon*, 563 U.S. at 290.

To interpret Section 98005's waiver as to "any cause of action" arising under IGRA, to include attorneys' fees, is not specific enough to constitute a waiver as to attorneys' fee claims. In *Sossamon*, the Supreme Court found the term "appropriate relief" too vague to provide a waiver to claims for monetary damages. *Sossamon*, 563 U.S. at 285-88. The phrase "any cause of action" in Section 98005 is equally nonspecific as to attorneys' fees. This phrase is followed by specific, authorized causes of action related to negotiation of and compliance with class III gaming compacts, rather than reference to an IGRA-based claim. Further, IGRA provides specific

remedies, which do not include an award of attorneys' fees. 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii). Section 98005's silence on attorneys' fees therefore stands in contrast to language specifying a waiver for other IGRA-based claims.

2. No Other Cited Provision of State Law Serves to Waive State Sovereign Immunity to Attorneys' Fees

The Tribes cite article IV, section 19(f), of the California Constitution, California Government Code section 12012.25(d), and section 12.3 of the 1999 Compacts in support of their argument that this Court's determination that the State negotiated in bad faith necessarily implicates state law. (Tribes' Mot. 14-16.) But none of these provisions waives the State's sovereign immunity as to attorneys' fees as each fails to address attorneys' fees at all. Rather, the cited state-law provisions authorize the Governor to negotiate and execute tribal-state compacts under IGRA. In fact, section 12.3 of the 1999 Compacts explicitly reserves the State's immunity as to all monetary awards.

Article IV, section 19(f) of the California Constitution and California Government Code section 12012.25(d) authorize and designate the Governor to negotiate and execute compacts on behalf of the State in compliance with IGRA. Cal. Const., art. IV, § 19(f) ("the Governor is authorized to negotiate

and conclude compacts . . . in accordance with federal law"); Cal. Gov't Code § 12012.25(d) ("The Governor is the designated state officer responsible for negotiating and executing . . . tribal-state gaming compacts . . . pursuant to" IGRA). Neither provision waives the State's sovereign immunity, let alone its immunity to attorneys' fees.

The Tribes argue that their good-faith claims under IGRA are only actionable because these state-law provisions allow tribes to conduct class III gaming and the State waived its sovereign immunity in federal court under Section 98005. (Tribes' Mot. 18-19.) The Tribes further claim that a violation of IGRA necessarily constitutes a violation of the California Constitution and California Government Code Section 12012.25. (Tribe's Mot. 19.) The Governor under these state-law provisions is authorized to negotiate and execute compacts. This designation of the Governor as the negotiator for tribal-state compacts under IGRA does not bootstrap into state law the panoply of IGRA's federal requirements for appropriate topics and terms for good-faith negotiations. These provisions certainly do not waive the State's immunity for an award of attorneys' fees or create a state-law cause of action to award attorneys' fees under Section 1021.5.

Nor do the 1999 Compacts provide for an attorneys' fees remedy, or waive state immunity for such an award. For example, section 12.3 of the

1999 Compacts instructs the parties to comply with IGRA and provides for venue in federal court.[3] Section 9.4, titled "Limited Waiver of Sovereign Immunity," specifies that the parties waive sovereign immunity and "expressly consent to be sued" if "[n]either side makes any claim for monetary damages." 1999 Compacts, § 9.4(a)(2). The mutual waiver is limited to claims for "injunctive, specific performance . . . or declaratory relief." *Id*. In sum, the 1999 Compacts do not authorize attorneys' fees, nor do they provide for an unambiguous waiver of immunity to attorneys' fees awards.

Finally, the Tribes may cite to *Pauma Band of Mission Indians v. California*, 813 F.3d 1155 (9th Cir. 2015) (*Pauma*) to argue that the State has waived immunity to attorneys' fees through section 9.4 of the 1999 Compacts. However, *Pauma* is inapplicable because the Ninth Circuit there determined that the State had waived its sovereign immunity to an award of restitution under section 9.4 of the 1999 Compact as a remedy for rescission regarding the misrepresentation of a fully formed contract. *Pauma* at 1167-69. In short, *Pauma's* narrow restitution-based holding does not apply here. *Pauma* is limited to a claim for rescission and restitution arising from the

[3] Sections 12.3 and 9.4 are identical in each of the 1999 Compacts between the State and the Tribes.

waiver language in the 1999 Compacts interpreted by the *Pauma* court as contemplating restitution as a potential remedy. *Id.* at 1170-71.

III. THE TRIBES FAIL TO MEET ALL THE STATUTORY REQUIREMENTS FOR AN ATTORNEYS' FEES AWARD UNDER CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 1021.5

Even if IGRA, state law, and the 1999 Compacts authorized attorneys' fees, and even if the State waived its sovereign immunity, the Tribes' still are not entitled to attorneys' fees because they cannot establish all three criteria for an attorneys' fees award under Section 1021.5. A party seeking attorneys' fees under this statute must show that its litigation:

> "(1) served to vindicate an important public right; (2) conferred a significant benefit on the general public or a large class of persons; and (3) [was necessary and] imposed a financial burden on plaintiffs which was out of proportion to their individual stake in the matter."

City of Maywood v. Los Angeles Unified School Dist., 208 Cal. App. 4th 362, 429 (2021), (quoting *RiverWatch v. County of San Diego Dept. of Environmental Health*, 175 Cal. App. 4th 768, 775 (2009)). "Because the statute states the criteria in the conjunctive, each must be satisfied to justify a fee award." *Id.*

Section 1021.5's third criterion requires that an award of attorneys' fees is appropriate only where "the necessity and financial burden of private

enforcement . . . are such as to make the award appropriate." As such, under this state statute, awarding attorneys' fees is appropriate only when necessary to remove an unreasonable financial burden as an impediment to the private enforcement of important rights affecting the public interest. "The private attorney general theory recognizes citizens frequently have common interests of significant societal importance, but which do not involve any individual's financial interests to the extent necessary to encourage private litigation to enforce the right." *Beach Colony II v. California Coastal Comm'n*, 166 Cal. App. 3d 106, 114 (1985) (*Beach Colony II*), (citing *Save El Toro Assn. v. Days*, 98 Cal. App. 3d 544, 552 (1979)). "To encourage such suits, attorneys fees are awarded when a significant public benefit is conferred through litigation pursued by one whose personal stake is insufficient to otherwise encourage the action." *Id.* 166 Cal. App. 3d at 114, (citing *Woodland Hills Residents Assn., Inc. v. City Council,* 23 Cal. 3d 917, 933 (1979)).

Here, based on an extremely limited record before this Court, the Tribes' Motion cannot meet Section 1021.5's third criterion because their stake in suing the State under IGRA does not appear insufficient to encourage their litigation. To the contrary, the Tribes appear to possess a significant financial stake motivating them to (1) pursue their pecuniary

interests *vis-a-vis* compact negotiations pursuant to IGRA, and (2) subsequently sue the State under IGRA for failing to negotiate in good faith. The financial stakes were significant for the Tribes, all of which are parties to the 1999 Compacts.

The lucrative nature of the 1999 Compacts, even for tribes with modestly sized class III gaming casinos, is significant. Indeed, by 2019, tribal gaming revenues in California were approximately $9.5 billion, which is more than twenty-seven percent of the total tribal gaming revenues nationwide.[4] Moreover, the success of Chicken Ranch's casino permitted the Tribe to expand its operations. On January 30, 2021, the Tribe announced plans for a new casino and resort facility. (State Appellants' Req. for Jud. Not., p. 3, ¶ 1, Ex. A.) Chicken Ranch's new nine-story property will include a hotel with over 190 rooms. (*Id.*) And the casino's "new gaming floor will see an expansion from the current casino, increasing the number of machines by 30% while bolstering table game offerings." (*Id.*)

[4] The National Indian Gaming Commission reported tribal gaming revenues to be $9,680,300,000 in its Sacramento Region and $34,578,542,000 nationally. The Sacramento Region covers California and Northern Nevada. Only one tribal casino operates in Northern Nevada. *See* https://www.nigc.gov/images/uploads/2019_GGR_Charts_by_Region.pdf State Appellants' Req. for Jud. Not., p. 3, ¶ 2, Ex. B.

Given the financial stakes in their 1999 Compacts, these Tribes all possess significant, and important, financial interests in obtaining new compacts that will permit continued and expanded gaming operations. The State applauds the Tribes' class III gaming financial success. However, the State respectfully submits that given the Tribes' obvious and ongoing financial interests, the Tribes cannot, based on this record, show that their 1999 Compacts and class III casinos are insufficient to encourage the litigation. *See Beach Colony II*, 166 Cal. App. 3d at 114.

Accordingly, if this Court does not deny the Tribes' Motion for either the lack of authority for attorneys' fees or immunity from attorneys' fees, the question of the Tribes' eligibility for attorneys' fees under Section 1021.5 should be remanded to the district court for adjudication. Granting the Tribes' Motion on this limited record would be improper because the Tribes have not established all the criteria for an attorneys' fees award under Section 1021.5.

CONCLUSION

For all the foregoing reasons, this Court should deny the Tribe's Motion.

Dated: October 27, 2022

Respectfully submitted,

ROB BONTA
Attorney General of California
SARA J. DRAKE
Senior Assistant Attorney General
T. MICHELLE LAIRD
Supervising Deputy Attorney General
NOEL A. FISCHER
Deputy Attorney General

/s/ Timothy M. Muscat

TIMOTHY M. MUSCAT
Deputy Attorney General
Attorneys for State Appellants

CERTIFICATE OF SERVICE

Case Name:	**Chicken Ranch Rancheria, et al. v. State of California, et al.**	No.	**21-15751**

I hereby certify that on October 27, 2022, I caused to be electronically filed the following documents with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system:

STATE APPELLANTS' OPPOSITION TO APPELLEES' MOTION FOR ATTORNEYS' FEES

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 27, 2022, at Sacramento, California.

Linda Thorpe	*/s/ Linda Thorpe*
Declarant	Signature